OPINION OF ADVOCATE GENERAL MAZÁK

delivered on 18 November 2008 [1]

1. The Landessozialgericht (Higher Social Court), Saxony, asks the Court to determine whether a body like Maschinenbau- und Metall-Berufsgenossenschaft ('MMB'), which provides insurance against accidents at work and occupational diseases, is to be treated as an undertaking within the meaning of Articles 81 EC and 82 EC. Moreover, the referring court wishes to ascertain whether the compulsory affiliation of certain employers to a body such as MMB [2] pursuant to the German legal system infringes the rules of the Treaty, in particular the rules on the freedom to provide and/or receive services.

I — National legal framework

2. Book VII of the Code of Social Law (Sozialgesetzbuch) deals with compulsory accident insurance (SGB VII). [3] Paragraph 152(1) of SGB VII, entitled 'Apportionment of liability', provides:

'Contributions shall be determined following the expiry of the calendar year in which claims for contributions have, in principle, arisen, on the basis of an apportionment of liability. Such an apportionment must cover the requirements of the preceding year, and shall include contributions which are necessary to provide an appropriate reserve. Apart from that, contributions may be levied only in order to provide funds for working capital.'

3. Paragraph 153 of the SGB VII, entitled 'Basis of calculation', provides:

'1. Contributions shall, save as otherwise provided below, be calculated by reference to funding requirements (liability in respect of apportionments), the wages and salaries of the insured persons and the categories of risk.

1 — Original language: English.

2 — It would appear that a body such as MMB is referred to under the German legal system as an employer's liability insurance association. In the interest of brevity, I shall refer at times to such bodies in this opinion as insurance associations.

3 — 20 April 2007, BGBl. 2007 I, p. 554.

2. The wages and salaries of the insured persons shall be taken as the basis of contribution up to the amount of their maximum annual earnings.

3. Regulations may provide that there is to be a minimum basis of calculation, by reference to the minimum annual wage or salary for insured persons who have completed their 18th year. …

4. In calculating contributions, the accident risk in the undertaking may be disregarded in whole or in part, to the extent that expenditure in respect of pensions, death benefits and compensation:

    1. is based on damage or injury caused by insured risks in those undertakings when that damage or injury has ceased or been extinguished prior to the fourth year preceding the year in which contributions fall to be apportioned, or

    2. is based on damage or injury caused by insured risks which first occurred or first became apparent prior to the fourth year preceding the year in which contributions fall to be apportioned.

    The total amount of expenditure which, in accordance with the first sentence of this subparagraph, is allocated to undertakings without reference being made to the level of accident risk may not exceed 30% of the total expenditure in respect of pensions, death benefits and compensation. The implementing provisions shall be determined by regulation.'

4. Paragraph 157 of SGB VII, entitled 'Scale of risks', provides:

'1. Undertakings responsible for providing accident insurance cover shall, acting autonomously, draw up a scale of risks. That scale of risks shall specify categories of risk so that contributions may be levied on a graduated basis. …

2. The scale of risks shall be divided into tariff positions, setting out categories of persons exposed to risk by reference to a risk comparison based on generally accepted insurance principles. …

3. Categories of risk shall be calculated by reference to the relationship between benefits paid and wages or salaries.

…'

5. Paragraph 176 of SGB VII, entitled 'Adjustment obligation', provides that to the extent that:

'1. the pension liability cost of an employer's liability insurance association is more than 4.5 times greater than that of the average pension liability cost of employers' liability insurance associations,

2. the pension liability cost of an employer's liability insurance association which allocates at least 20% and not more than 30% of its expenditure on pensions, death benefits and compensation under Paragraph 153(4) to undertakings without reference being made to the level of accident risk is more than three times greater than the average pension liability cost of employers' liability insurance associations, or

3. the compensation liability cost of an employers' liability insurance association is more than five times greater than the average compensation liability cost of employers' liability insurance associations the employers' liability insurance associations shall apportion the excess costs among themselves. Where the amount to be paid by way of adjustment under subparagraph (1)(2) exceeds the amount which the employers' liability insurance association apportions to undertakings without reference being had to the level of accident risk in accordance with subparagraph (1)(2), it shall be restricted to the latter amount.'

II — The main proceedings and the order for reference

6. Kattner Stahlbau GmbH ('Kattner') is a private limited company which was established on 13 November 2003 and started trading on 1 January 2004. By notice of 27 January 2004, MMB informed Kattner that MMB was the competent statutory accident insurance provider for Kattner. Kattner had been enrolled as Member No 600212360 pursuant to Paragraph 136 of SGB VII. The notice in question also included a decision on Kattner's affiliation to MMB.

7. By letter of 1 November 2004, Kattner gave notice of cancellation of its compulsory affiliation to MMB with effect from the end of 2004. According to the order for reference,

Kattner intended to obtain private insurance cover against existing risks.

8. By notice of 15 November 2004, MMB informed Kattner that, under the provisions of SGB VII, MMB was the competent statutory accident insurance provider for Kattner. Legally, it was not possible to opt out of accident insurance or to cancel statutory compulsory insurance. Kattner's cancellation of its affiliation to MMB was therefore declined. The notice of 15 November 2004 was confirmed by a decision of MMB of 20 April 2005 and by judgment of the Leipzig Social Court (Sozialgericht Leipzig) of 21 November 2005.

9. Pursuant to the order for reference, Kattner, in its appeal before the referring court, claims that its compulsory affiliation to MMB infringes Community law, as its freedom to receive services is being restricted. Kattner submitted a proposal by a Danish insurance undertaking, according to which that undertaking will insure Kattner in accordance with German accident insurance law against the risk of accidents at work, occupational diseases or accidents on the way to or from work, on the same terms as MMB. Moreover, the benefits are determined strictly in accordance with the list of benefits provided by the Deutsche Gesetzliche Unfallversicherung (German Statutory Accident Insurance Association). Kattner claims that MMB's position 'as sole and exclusive insurance provider infringes Articles 82 EC and 86 EC and that the restriction on competition cannot be justified. The same applies to the consequential restriction on the freedom to provide services under Article 49 EC et seq. There appear to be no overriding grounds of public interest to justify the monopoly of German accident insurance providers in their respective fields.'

10. The referring court considers that there are fundamental differences between the German and Italian statutory insurance schemes on accidents at work and that the ruling of the Court in the *Cisal* case [4] does not therefore wholly address certain questions which are material to the case pending before the referring court. The referring court notes that the second paragraph of the summary of the judgment in the *Cisal* case states that '[t]he concept of an undertaking, within the meaning of [Articles 81 EC and 82 EC], does not cover a body which is entrusted by law with the management of a scheme providing compulsory insurance against accidents at work and occupational diseases, where the amount of benefits and the amount of contributions are subject to supervision by the State and the compulsory affiliation which characterises such an insurance scheme is essential for the financial balance of the scheme and for application of the principle of solidarity, which means that benefits paid to insured persons are not strictly proportionate to the contributions paid by them. … Such a body fulfils an exclusively social function. Accordingly its activity is not an economic activity for the purposes of competition law.'

4 — Case C-218/00 [2002] ECR I-691.

11. The referring court considers that it is doubtful whether MMB is a 'body which is entrusted by law with the management of a scheme providing compulsory insurance against accidents at work and occupational diseases'. Moreover, an essential difference between the Italian and the German schemes stems from the fact that, according to the referring court, that the Istituto nazionale per l'assicurazione contro gli infortuni sul lavoro (INAIL) referred to in the *Cisal* case is a monopoly, whereas German statutory accident insurance is structured as an oligopoly. In addition, the referring court states that MMB is not entrusted with the management of a scheme providing compulsory insurance against accidents at work and occupational diseases but rather provides such insurance directly. According to the referring court, MMB's 'management activity' is essentially similar in structure to that of commercial entities, particularly insurance companies.

12. It was in those circumstances that the Landessozialgericht, Saxony, stayed proceedings and referred by order of 24 July 2007 to the Court the following questions pursuant to Article 234 EC:

'(a) Is [MMB] an undertaking within the meaning of Articles 81 EC and 82 EC?

(b) Does the compulsory affiliation of [Kattner] to [MMB] infringe Community law?'

III — The proceedings before the Court of Justice

13. Written observations were submitted by Kattner, MMB, the German Government and the Commission. No hearing was requested or held.

IV — Admissibility

14. A number of objections to admissibility were raised regarding the questions referred by the Landessozialgericht, Saxony, to the Court.

15. Firstly, MMB and the Commission consider that the Court may only interpret Community law and may thus not rule on the compatibility of national law or measures with Community law. In that regard, the Commission considers that the first question of the referring court should be redrafted as it seeks an interpretation of national law and fails to specify the circumstances pursuant to which an entity such as MMB could, according to the referring court, be considered an undertaking pursuant to Articles 81 EC and 82 EC. Those circumstances are however listed in the body of the order for reference.

16. It should be recalled, first of all, that in proceedings brought under Article 234 EC the Court has no jurisdiction to apply the rules of Community law to a specific case or, consequently, to classify provisions of national law with respect to such a rule. It may, however, provide the national court with an interpretation of all relevant provisions of Community law which might be useful in assessing the effects of such provisions of national law. [5]

17. In my view, the national court by its first question requests the Court to apply Articles 81 EC and 82 EC to a specific case. I therefore consider that it is necessary for the Court to reformulate the first question referred to it. [6] Thus, the first question should be understood as asking whether the concept of an undertaking, within the meaning of Articles 81 EC and 82 EC, includes a body which provides insurance against accidents at work and occupational diseases, such as MMB. In addition, I consider that the information supplied by the referring court in the order for reference, as amplified by the written observations of Kattner, MMB, the German Government and the Commission, sufficiently appraises the Court of the facts and regulatory framework at issue in the main proceedings to enable it to interpret the Community competition rules in relation to the situation in question in that case.

18. Secondly, as regards the second question, the Commission considers that the referring court has not indicated in an adequate manner which rules of Community law require interpretation by the Court.

19. While the second question does not in fact indicate the rules of Community law which require interpretation, it is clear from the order for reference as a whole that the referring court seeks to ascertain whether Articles 49 EC et seq., 82 EC and 86 EC must be interpreted as precluding the compulsory affiliation of an undertaking such as Kattner to a body such as MMB.

20. Thirdly, MMB considers that the questions referred to the Court by the Landessozialgericht, Saxony, cannot result in a 'useful' answer for that court as it may not terminate Kattner's affiliation to MMB. Kattner's affiliation to MMB may only be terminated by annulling or modifying the decision on affiliation of 27 January 2004, which has not been challenged.

21. It is settled case-law that the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and national courts. In the context of that cooperation, the national court seized of the dispute, which alone has direct knowledge of the facts of the main action and must

5 — See, in particular, Case 37/86 *van Gastel* [1987] ECR 3589, paragraph 8.

6 — See Joined Cases C-329/06 and C-343/06 *Wiedemann* [2008] ECR I-4635, paragraph 45.

assume responsibility for the subsequent judicial decision, is in the best position to assess, having regard to the particular features of the case, whether a preliminary ruling is necessary to enable it to give judgment and the relevance of the questions which it refers to the Court. That does not alter the fact that it is for the Court, where necessary, to examine the circumstances in which the case was referred to it by the national court in order to assess whether it has jurisdiction and, in particular, determine whether the interpretation of Community law that is sought bears any relation to the facts of the main action or its purpose, so that the Court is not obliged to deliver advisory opinions on general or hypothetical questions. If it appears that the question raised is manifestly irrelevant for the purposes of deciding the case, the Court must declare that there is no need to proceed to judgment. [7]

22. It is clear from the order for reference that the dispute in the main proceedings relates principally to the obligation to be affiliated to MMB imposed on Kattner pursuant to the national legal system and that the national court has doubts regarding whether that obligation complies with the Community law. The interpretation of Community law that is sought by the referring court thus appears to have a bearing on the facts and purpose of the main action and is thus, in my view, not manifestly irrelevant for the purposes of deciding that action.

23. The objections to admissibility raised should thus, in my view, be rejected.

V — Substance

A — *Question 1*

1. Main arguments of the parties

24. Kattner claims that the first question referred should be answered in the affirmative and that an insurance association such as MMB should be considered an undertaking pursuant to Articles 81 EC and 82 EC.

25. In contrast to the Italian insurance scheme, which was examined in the *Cisal* case, in Germany the amount of benefits and contributions is not established by law but in accordance with the statute or regulations of

7 — See Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, paragraphs 13 to 15.

each insurance association. While the bases on which contributions are calculated are laid down by law, Kattner considers that those criteria give great freedom to insurance associations. Kattner notes that the legislator has no influence over the requirements of an insurance association for the previous year pursuant to Paragraph 152 of SGB VII or the salaries of insured persons. While a ceiling is placed on the salary of insured persons when calculating contributions, [8] that ceiling may be raised pursuant to Paragraph 85(2)(2) of SGB VII by the competent insurance association. Indeed, all the insurance associations in Germany have availed of that possibility. Furthermore, insurance associations may, when calculating contributions, take into account pursuant to Paragraph 153(3) of SGB VII at least the annual minimum salary. However, the terms of that provision are facultative in nature. Moreover, while the law does not provide for a minimum contribution, Paragraph 161 of SGB VII provides for the possibility, of which practically all the insurance associations in Germany have availed, of levying a uniform minimum contribution. Kattner also claims that it is clear from the wording of Paragraph 157 of SGB VII that the fixing of the scale of risk lies exclusively with the competent insurance association and is subject only to limited control by the courts. Pursuant to Paragraph 158 of SGB VII the scale of risk fixed by an insurance association is subject to approval by the relevant supervisory authority. However, such approval is merely a formal act which is only refused in extremely rare cases. Moreover, the fact that in accordance with Paragraph 162 of SGB VII additional premiums, discounts and bonuses may be collected or granted by an insurance association underscores the fact that the contributions are free from State regulation.

8 — For example EUR 57 120 in 2003.

26. As regards the benefits paid to insured persons, the amount of such benefits is fixed primarily by the insurance associations rather than by the legislator. While Paragraphs 26 et seq. and 81 et seq. of SGB VII establish generally the benefits which must be paid by insurance associations, there is no provision which legally fixes their amount. For example, an insurance association may in accordance with Paragraph 85(2) of SGB VII increase the amount of the maximum annual salary which is used as a reference in the payment of certain benefits.

27. Kattner considers that the elements of solidarity present in the German system are insufficient in order for the insurance associations not to be regarded as undertakings pursuant to Article 81 EC et seq. In that regard, Kattner notes firstly, that in accordance with the *Cisal* judgment, the social aim of an insurance scheme is emphasised by the fact that benefits are paid even when the contributions due have not been paid. However, the social aim of an insurance scheme is not in itself sufficient to preclude the activity in question from being classified as an economic activity. According to Kattner, in the absence of any figures on the level of such unpaid contributions, this element of solidarity cannot be decisive. Moreover, such unpaid contributions may be recovered at a later stage. Secondly, Kattner considers that in accordance with Paragraph 157 of SGB VII, contributions are largely calculated on the basis of the effective degree of risk of accident rather than on the basis of general criteria. Thirdly, Kattner claims that, contrary to the situation in the *Cisal* case — where the amount of benefits is laid down by Italian law and such benefits are paid regardless of

the contributions paid and the financial results of the investments made by the insurance association — there is no risk of benefits being paid that are not covered by contributions as pursuant to Paragraph 152(1) of SGB VII contributions are determined by means of apportionment after the expiry of the calendar year during which the obligation to pay contributions arose. Fourthly, Kattner notes that in the *Cisal* case the absence of a direct link between the contributions paid and the benefits granted was a key factor in finding the existence of solidarity. As regards the relationship between contributions and benefits under the German legal system, Kattner claims that German law does not provide for any exoneration of the duty to pay contributions where salaries are below a certain level. Moreover, in accordance with Paragraph 161 of SGB VII, insurance associations may levy a uniform minimum contribution. Most of the insurance associations have availed of this possibility which allows them to synchronise the minimum contributions and benefits. In addition, a maximum contribution may arise due to the taking into account, when calculating the contribution, inter alia, of the maximum annual salary fixed by law. However the maximum annual salary is also taken into account when calculating the benefits thus ensuring a proportional relationship between contributions and benefits. Fifthly, Kattner also considers that the principle of solidarity implies that undertakings which have a high risk of accident are financed by those having a lower risk. However, Kattner claims that the rules on risk adjustment in Germany merely ensure the maintenance of the system rather that to guarantee solidarity. Kattner notes that risk adjustment takes place firstly within the same category of risk and that any adjustment between the different branches of the same insurance association or amongst such associations is merely to maintain the system. Sixthly, Kattner maintains that given that it is possible to separate old burdens from recent ones, it is not necessary to maintain in place compulsory insurance to cover such old burdens, the importance of which will tend to reduce with the passage of time.

28. Kattner also claims that the manner in which a body is financed is not relevant with regard to its qualification as an undertaking pursuant to Article 81 EC et seq. However, Kattner claims that while contributions for compulsory accident insurance are fixed by means of apportionment, there is also some measure of capitalisation in the German scheme. In addition, pursuant to Paragraph 164 of SGB VII and in order to guarantee the payment of contributions, insurance associations may, inter alia, levy advance contribution payments in the course of the year in order to cover insurance requirements. Thus the financing of such associations does not really differ from a private insurance company, which also take into account the foreseeable annual requirements and calculate their contributions accordingly.

29. MMB, the German Government and the Commission consider that an insurance association such as MMB is not an undertaking pursuant to Articles 81 EC and 82 EC. They consider that, in accordance with the ruling in *Cisal*, such insurance associations do not exercise an economic activity but pursue purely social objectives and are a branch of the social security system

in Germany. Moreover, workers may exercise their rights under the insurance scheme in question independently of any fault or, indeed, the payment of contributions by their employer. MMB and the German Government stress the fact that no risks are excluded from the insurance cover in question. MMB and the Commission also underline the fact that the insurance associations in question in Germany are non-profit making.

30. MMB, the German Government and the Commission claim that the manner in which insurance contributions are levied and benefits are paid demonstrates that the compulsory insurance scheme in question applies the principle of solidarity.

31. As regards contributions, MMB notes that in accordance with Paragraph 150 of SGB VII, only the employer is responsible for their payment rather than the employee. The German Government claims that, contrary to private insurance premiums which are based on the insured person's risk, under the German insurance scheme in question, factors which increase risk, for example an employee's previous history of illness, may not be taken into account when calculating the contributions to be paid or in order to exclude the payment of benefits. Benefits are paid independent of fault on the part of the employer or the victim and irrespective of the payment or otherwise of contributions.

32. MMB, the German Government and the Commission claim that the accident insurance scheme in Germany is financed in accordance with the principle of subsequent coverage of requirements. Contributions of members of an insurance association are therefore calculated by dividing the global requirements of the association for the previous year, including any necessary future contingency reserves, amongst the members. The German Government claims that the contributions of an undertaking are based on the salaries paid to the insured persons, taking into consideration the risk category of the branch of industry of the undertaking in question. Pursuant to Paragraph 153(1) of SGB VII individual branches of industry are divided into risk categories which reflect the number and seriousness of accidents of each branch.

33. According to the German Government, the rules on contributions apply the principle of solidarity on three levels. Firstly, each insurance association is required to establish a scale of risks containing categories of risk. Undertakings of a particular branch of industry are grouped together into a risk community, independent of the actual risk of an individual undertaking. According to the German Government and the Commission, given that contributions are based on the risk association with a particular branch of industry the principle of solidarity applies between undertakings of the same branch. Secondly, insurance associations in general base the scale of risk of a particular branch of industry on the basis of recent accidents rather than on old accidents, thereby excluding from the risk assessment of a particular branch of industry many factors. The principle of solidarity therefore operates between the branches of industry within an insurance association. Thirdly, the principle

of solidarity operates as between insurance associations. Pursuant to Paragraph 176 et seq. of SGB VII, where certain payments of an insurance association exceed a particular amount, the other insurance associations are obliged to pay for the amount in excess. In that regard, MMB notes that EUR 500 to 600 million are presently paid in compensation pursuant to Paragraph 176 et seq. of SGB VII. The German Government and the Commission consider that it is not necessary that one central body operates the insurance scheme in question in order to ensure that the principle of solidarity is fulfilled, given the system of compensation as between insurance associations laid down by Paragraph 176 et seq. of the SGB VII.

34. The Commission and MMB stress the role of the German insurance scheme in question in preventing accidents. The Commission also notes that the German scheme, as a preventative measure, adjusts the contributions payable depending on the propensity for accidents of a specific undertaking, thereby linking somewhat the level of contributions payable to the risk insured. However, the Commission stresses the fact that the link between contributions and risk is incomplete and that the requirement of 'strict proportionality' laid down by the Court is not met.

35. As regards the question of benefits, MMB, the German Government and the Commission claim that the amount of benefits paid is not necessarily proportionate to the insured person's earnings. The German Government and MMB highlight the fact that over 30% of the benefits paid by insurance associations are payments in kind for, inter alia, accident prevention and reimbursement of medical expenses, which are unrelated to the salary of the insured person and to the contributions paid. As regards payments such as loss of earnings and pensions which depend on earnings prior to an accident, the German Government and the Commission claim that the minimum and maximum salary which may be taken into account are fixed by Paragraph 85 of SGB VII, thereby leading to a dissociation between the benefits paid and the salary of the insured person.

36. MMB, the German Government and the Commission underline the fact that the German system of accident insurance in question is subject to supervision by the State. MMB claims that it is governed by public law and that it is obliged to fulfil the tasks which are assigned to it by law. Moreover, in accordance with Paragraph 31 of SGB I, the rights and obligations relating to the social benefits under the SGB may not be established, modified or annulled save to the extent permitted by law. According to MMB, the German Government and the Commission, benefits and the conditions for their payment are fixed by law. According to the German Government, the calculation of contributions lies to a large extent with the insurance associations, due in particular to the fact that they establish the scale of risks. However, MMB and the German Government claim that the establishment of such scales is subject to the express authorisation of the State supervisory body. According to the German Government, when establishing such scales of risk, the insurance associations must comply with the law, in particular the Basic Law, and they must, in accordance with Paragraph 157 of SGB VII, create categories of risk which allow for the gradation of contribu-

tions. MMB claims that contributions must be calculated in accordance with Paragraph 150 of SGB VII and that no exceptions may be made on behalf of individual firms. In addition, insurance associations are prohibited from competing with each other.

2. Assessment

37. The referring court wishes to ascertain whether a body such as MMB may be considered an undertaking for the purposes of Articles 81 EC and 82 EC. It is worth recalling that the dispute before the referring court centres on whether Kattner may terminate its compulsory affiliation to MMB. In effect Kattner claims, in the proceedings before the referring court, that MMB's position as sole and exclusive insurance provider infringes Articles 82 EC and 86 EC.

38. It is clear from the case file before the Court that employers in Germany are required, in principle, to obtain insurance against accidents at work and occupational diseases. In the order for reference, the referring court stated that compulsory affiliation to the different employers' liability insurance associations in Germany is based on rules which determine the sectorial and territorial competences of individual insurance associations.

39. In the context of competition law, the Court has held that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. [9]

40. In the *Albany* [10] case, the Court, summarising its finding in *Poucet and Pistre*, [11] stated that the concept of an undertaking does not encompass organisations charged with the management of certain compulsory social security schemes, based on the principle of solidarity. Under the sickness and maternity scheme forming part of the system in question in *Poucet and Pistre*, the benefits were the same for all beneficiaries, even though contributions were proportional to income; under the pension scheme, retirement pensions were funded by workers in employment; furthermore, the statutory pension entitlements were not proportional to the contributions paid into the pension scheme; finally, schemes with a surplus contributed to the financing of those with structural financial difficulties. That solidarity made it necessary for the various schemes to be managed by a single organisation and for affiliation to the schemes to be compulsory. [12]

9 — Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21, and *Cisal*, cited in footnote 4, paragraph 22. It has also been consistently held that any activity consisting in offering goods and services on a given market is an economic activity: Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7, and Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36.

10 — Case C-67/96 [1999] ECR I-5751.

11 — Joined Cases C-159/91 and C-160/91 [1993] ECR I-637.

12 — See paragraph 78 of *Albany*, cited in footnote 10.

41. In the *Albany* case, the Court also noted that in contrast, in *Fédération française des sociétés d'assurance and Others*, [13] it held that a non-profit-making organisation which managed a pension scheme intended to supplement a basic compulsory scheme, established by law as an optional scheme and operating according to the principle of capitalisation, was an undertaking within the meaning of Article 81 EC et seq. Optional affiliation, application of the principle of capitalisation and the fact that benefits depended solely on the amount of the contributions paid by the beneficiaries and on the financial results of the investments made by the managing organisation implied that that organisation carried on an economic activity in competition with life assurance companies. [14]

42. In the field of insurance against accidents at work and occupational diseases, the Court, in the *Cisal* case, has held that a body, namely INAIL, entrusted with the management of a compulsory insurance scheme against accidents at work and occupational diseases fulfilled an exclusively social function and did not engage in an economic activity for the purpose of competition law. The Court concluded that the INAIL did not constitute an undertaking within the meaning of Articles 81 EC and 82 EC. [15]

43. In reaching its conclusion in the *Cisal* case, the Court noted that the covering of risks of accidents at work and occupational diseases has for a long time been part of the social protection which Member States afford to all or part of their population. [16] However, the Court stated that the social aim of an insurance scheme is not in itself sufficient to preclude the activity in question from being classified as an economic activity. [17] Therefore, in addition to pursuing a social aim, the insurance scheme must apply the principle of solidarity. [18] As INAIL was financed by contributions the rate of which was not systematically proportionate to the risk insured and the amount of benefits paid was not necessarily proportionate to the insured persons' earnings, the Court found that the absence of any direct link between the contributions paid and the benefits granted thus entailed solidarity between better paid workers and those who, given their low earnings, would be deprived of proper social cover if such a link existed. [19] The Court stated that the compulsory affiliation which characterises such an insurance scheme is essential for the financial balance of the scheme and for application of the principle of solidarity, which means that benefits paid to insured persons are not strictly proportionate to the contributions paid by them. [20]

44. The Court in the *Cisal* case, in addition to noting that the Italian scheme in question applies the principle of solidarity, stressed the fact that the two essential elements of the scheme managed by INAIL, namely the amount of contributions paid and benefits

13 — Case C-244/94 [1995] ECR I-4013.

14 — See paragraph 79 of *Albany*, cited in footnote 10.

15 — *Cisal*, cited in footnote 4, paragraphs 32 and 45.

16 — See paragraph 32 of *Cisal*, cited in footnote 4.

17 — See paragraph 37 of *Cisal*, cited in footnote 4; and paragraph 86 of *Albany*, cited in footnote 10; see also Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 118.

18 — See paragraph 38 of *Cisal*, cited in footnote 4.

19 — See paragraphs 39 to 42 of *Cisal*, cited in footnote 4.

20 — See paragraph 44 of *Cisal*, cited in footnote 4.

granted to insured persons were subject to supervision by the State. [21]

45. While it is evident from the case-law of the Court that the social aim of an insurance scheme is clearly insufficient in itself to preclude an activity from being classified as an economic activity, I consider that such an aim is nonetheless a relevant factor, amongst others, in ascertaining whether a particular activity is non-economic in nature. It is therefore necessary to examine whether the statutory scheme providing insurance against accidents at work and occupational diseases in question in the main proceedings pursues a social objective.

46. Subject to verification by the referring court, it would appear from Paragraph 1 of SGB VII that the purpose of the insurance scheme in question is firstly, to prevent, by all appropriate means, accidents at work and occupational diseases, together with all health risks associated with work and, secondly, on the occurrence of accidents at work or occupational diseases, to restore, by all appropriate means, the health and the capacity to work of insured persons and to provide financial compensation to insured persons or their dependants. In addition and subject to verification by the referring court, it would appear that insurance cover is provided under the scheme irrespective of any fault of the victim or the employer and irrespective of the actual payment of contributions by the employer. Moreover, it would appear from the order for reference that the insurance associations are governed by public law and are non-profit-making.

47. It is also necessary to examine whether the German insurance scheme in question applies the principle of solidarity and whether the essential elements of that scheme are subject to State supervision.

48. In assessing whether a particular social security scheme applies the principle of solidarity, the Court has paid particular attention to the levels of contributions paid and the benefits received under the scheme. The principle of solidarity will not be respected if the benefits received by the persons covered by a scheme directly depend on the contributions paid by them or on their behalf. Thus, in the case of a social security scheme which provides insurance against the risks of accidents at work and occupational diseases, that scheme must, in my view, demonstrate redistributive elements which exceed that of private insurance cover. [22]

49. As regards the rates of contribution under the German scheme in question, the Court in the *Cisal* case gave great weight to the fact that the Italian insurance scheme in question was

21 — See paragraph 44 of *Cisal*, cited in footnote 4.

22 — See to that effect, the Opinion of Advocate General Jacobs in *Albany*, points 37 to 82, cited in footnote 10. See also Opinion of Advocate General Jacobs in *Cisal*, points 50 to 66, cited in footnote 4.

financed by contributions the rate of which was not systematically proportionate to the risk insured. It would appear from the case-file, subject to verification by the referring court, that the contributions paid by an employer under the German scheme in question are not calculated solely on the basis of an actuarial calculation of the risk of that individual undertaking, [23] but in accordance, inter alia, with Paragraphs 152 and 153 of SGB VII by reference to, firstly, the funding requirements of an insurance association for the previous calendar year, secondly, the salaries of the insured persons and, thirdly, the category of risk of the branch of industry to which the undertaking belongs.

50. In addition, it would appear that under the German insurance scheme in question, branches of industry are divided into risk categories depending on the risk factor linked to their activities and that contributions are thus calculated, inter alia, on the basis of the risk of that branch of industry rather than solely on the risk of a particular undertaking. The creation of such risk categories for the purpose of assessing contributions ensures, in my view, that the principle of solidarity applies between undertakings of the same branch of industry. Moreover, subject to verification by the referring court, it would appear that Paragraph 176 of SGB VII provides for the apportionment of certain costs of an insurance association which are considerably in excess of the average costs in question of insurance associations in Germany between those associations. The possibility of such apportionment would appear to ensure that the German insurance system in question leads to some measure of solidarity on a national basis amongst all the insured persons in Germany.

51. The amount of benefits paid under the German insurance scheme in question is also not necessarily proportionate to the insured person's income as certain payments are uniform in nature irrespective of whether relatively high or low contributions were paid on behalf of that insured person. Despite the fact that pursuant to Paragraph 153 of SGB VII the insured person's income is a factor in assessing contributions, the referring court stated in the order for reference that 12.4% of total payments in 2002, such as out-patient and in-patient care, were not dependent on the insured person's income.

52. In that regard, as the Court stated in *Cisal*, 'the absence of any direct link between the contributions paid and the benefits granted entails solidarity between better paid workers and those who, given their low earnings, would be deprived of proper social cover if such a link existed'. [24] In addition, I consider that given that insurance contributions are not solely based on the propensity to risk of an

23 — It appears however that the contributions of individual undertakings may be adjusted to some extent depending on their accident rate. I would note that it appears from Advocate General Jacobs' opinion in *Cisal* that under the Italian scheme for insurance against accidents at work and occupational diseases the average contributions in respect of employees were calculated as a certain percentage of their remuneration. That percentage depended on the average risk of the activity of the undertaking for which they worked. The percentage so determined could be modified for individual undertakings if those undertakings could prove that by virtue for example of safety measures the risk of their activities was lower than the nationwide average. See point 22 of Advocate General Jacobs' opinion, case cited in footnote 4.

24 — Paragraph 42.

individual undertaking or indeed a particular branch of industry, the principle of solidarity is maintained between workers in Germany irrespective of the nature of their activities.

53. As regards the question of whether the essential elements of the German insurance scheme in question are subject to State supervision, the referring court states that the minimum and maximum salary can be set by an insurance association's own rules and that those figures are relevant not only to the assessment of contributions, but also of benefits, particularly pensions.[25] It is also perhaps worth noting, while this matter was not specifically raised in the order for reference, that Kattner claims that the fixing of the scales of risk lies with the competent insurance association and is subject only to limited control by the courts. MMB and the German Government however claim that the establishment of such scales is subject to the express authorisation of the State supervisory body.

54. While some degree of latitude is evidently granted to the insurance associations in Germany in fixing contributions and those associations may influence to some extent the level of certain benefits paid, it would appear, subject to verification by the referring court, that the flexibility in question is specifically established by law and that the elements of solidarity in the scheme highlighted above[26] are maintained under such a flexible system. It would thus appear that the key parameters for establishing the contributions payable under the German insurance scheme in question and the nature of the benefits provided under that scheme, together with the conditions for the grant of such benefits,[27] are fixed by law and must be adhered to by insurance associations.

55. I therefore consider that the German insurance scheme in question would appear to apply the principle of solidarity and that the essential elements of that scheme are subject to State supervision. It is however necessary to address a number of particular features of the scheme in question highlighted by the referring court which differ from other schemes previously examined by the Court.

56. The referring court noted in its order for reference that, unlike the situation in the *Cisal*

25 — See perhaps in contrast, paragraphs 40 and 41 of the *Cisal* judgment, cited in footnote 4.

26 — See points 49 to 52 above.

27 — See by contrast paragraph 114 of *Pavlov and Others* (cited in footnote 17) where the Court noted that the fund in question in that case 'determines the amount of contributions and benefits and operates on the basis of the principle of capitalisation. Thus, the level of benefits provided by the Fund depends on the performance of its investments ...'.

case, there is no rule in Germany capping contribution rates in relation to high risks. [28]

57. In my view, the particular features of a social security scheme and its adherence to the principle of solidarity must be assessed on an individual basis, taking into account all relevant factors. The presence or otherwise of certain features of a scheme which were found by the Court in its previous case-law to be evidence of the principle of solidarity may not necessarily be decisive in other cases. I consider that the finding of the referring court as regards the absence of an explicit [29] maximum ceiling in respect of contributions under the German insurance scheme may not undermine or eliminate the elements of solidarity which appear to be present in that scheme. [30] Such a factor is only of relevance if it influences to a substantial extent the relationship between contributions paid and benefits granted by the scheme in question thereby leading to the effective abandonment of the principle of solidarity. [31] This is a matter which the referring court must establish.

58. The referring court also considers that there is an essential difference between the Italian insurance scheme in *Cisal* and the German scheme in question in that the INAIL is a monopoly, whereas the German insurance scheme is structured as an oligopoly. In addition, according to the referring court MMB's 'management activity' is essentially similar in structure to that of commercial entities, particularly insurance companies. MMB 'does not manage the scheme; it is part of it'.

59. In my view, the mere fact that a Member State has opted to apportion the operation of a social security system to a number of different entities on a sectorial and/or geographic basis cannot of itself render the activities of those entities economic in nature where the necessary elements of solidarity and State supervision are present. To find otherwise would be to grant inappropriate weight to the form of technical or organisational arrangement chosen by a Member State in operating a part of its social security system rather than to the substance of the scheme in question.

60. Indeed, the Court in *Poucet and Pistre* found that the activities of a sickness and maternity insurance scheme and an old-age insurance scheme in France, which operated on a regional and sectorial basis, were not economic in nature. In addition, in its

28 — It would appear that the referring court is highlighting the statement of the Court in paragraph 39 of the *Cisal* case (cited in footnote 4) where the Court found that '[t]he [Italian] insurance scheme is financed by contributions the rate of which is not systematically proportionate to the risk insured. For example, it is clear from the case-file that the rate may not exceed *a maximum ceiling*, even where the activity carried out entails a high risk, the balance of financing being born by all the undertakings in the same category as regards the risk run' (emphasis added).

29 — Subject to verification by the referring court, it would appear that Paragraph 152 of SGB VII places limits on the amount of contributions which may be levied and, inter alia, Paragraph 153 of SGB VII indicates the factors which may be taken into account when calculating contributions.

30 — See points 49 to 52 above.

31 — See points 49 to 52 above.

judgment in *AOK*,[32] the Court found that the activities of sickness funds in German sickness funds, which were organised on a regional and sectorial basis, were not economic in nature.

61. Similarly, the fact, as stated by the referring court, that the German insurance associations are not entrusted with the management of a scheme providing compulsory insurance against accidents at work and occupational diseases but rather with the provision of such insurance services[33] directly does not, of itself, render such activities economic in nature where the necessary elements of solidarity and State supervision are present.

62. I therefore consider that the answer to the first question referred should be that the concept of an undertaking, within the meaning of Articles 81 EC and 82 EC, does not include bodies such as MMB charged with the operation of a social security scheme based on the principle of solidarity, provided that all the essential elements of that scheme noted in this Opinion are subject to State supervision, which is a matter for the referring court to establish.

B — *Question 2*

63. By its second question the referring court asks in essence whether, firstly Articles 82 EC and 86 EC, and secondly, Article 49 EC et seq., must be interpreted as precluding an obligation imposed pursuant to the legal system of a Member State that requires employers such as Kattner to be affiliated to a body such as MMB for the purposes of obtaining insurance against accidents at work and occupational diseases.

64. As regards the question of interpretation of Articles 82 EC and 86 EC, it is clear in my view from the wording of those provisions that they apply to the conduct of undertakings.[34] Given that I consider, in the context of the German scheme in question, that a body such as MMB is not an undertaking, I do not consider that Articles 82 EC and 86 EC may be interpreted as precluding the compulsory affiliation by an employer such as Kattner to such a body.

1. Main arguments of the parties concerning Article 49 EC et seq.

65. Kattner considers that service monopolies constitute non-discriminatory barriers to the freedom to provide services and the

32 — Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01 [2004] ECR I-2493.

33 — The referring court stated in its order for reference that MMB's 'business is essentially the provision, processing and settlement of insurance services'.

34 — I have no reason to consider that the term 'undertaking' contained in Article 86 EC differs from that contained in Articles 81 EC and 82 EC.

freedom of establishment which may only be justified by overriding reasons of public interest. Kattner claims that as a result of the obligation to be affiliated to an insurance association, it is de facto impossible for private insurers to compete against the former. Moreover, the restriction is not justified by overriding reasons of public interest as insurance against accidents at work and occupational diseases may be provided by private insurers.

66. MMB claims that the German insurance associations cannot fulfil the objectives set for them by law in the absence of compulsory affiliation as the 'good risks' will migrate to private insurers while the insurance associations or the State will be left with the 'bad risks'. Migration will undermine the financial equilibrium of the entire scheme as 'bad' risks will only be able to obtain private cover at very high premium rates or indeed may not be able to obtain such cover. The claim that private insurers may provide the insurance cover in question loses sight of the fact that such insurers may not be economically capable of providing the full range of services offered under the current scheme.

67. The German Government claims that given that the insurance associations in question, in the light of the exclusively social nature of their activity, are not undertakings, the competent Member State also does not infringe, inter alia, the freedom to provide services by imposing compulsory affiliation to such social security bodies.

68. The Commission considers that the obligation imposed on an undertaking such as Kattner to be affiliated to an insurance association does not fall within the scope of application of the freedom to provide services. The Member States alone are responsible for the rules concerning compulsory affiliation to such social security systems.

2. Assessment

69. According to settled case-law, Community law does not detract from the powers of the Member States to organise their social security systems. In the absence of harmoni-

sation at Community level, [35] it is therefore for the legislation of each Member State to determine, first, the conditions concerning the right or duty to be insured with a social security scheme and, second, the conditions for entitlement to benefits. [36]

70. In my view this does not have the effect of withdrawing social security systems from the scope of the Treaty as the Member States must nevertheless comply with Community law when exercising those powers. [37] The Court has held that the special nature of certain services does not remove them from the ambit of the fundamental principle of freedom of movement. Consequently, the fact that the national rules at issue in the main proceedings fall within the sphere of social security cannot, in principal, exclude the application of Articles 49 EC and 50 EC. [38]

71. It would appear from the case-file before the Court that, in principle, a given employer in Germany is obliged not only to obtain insurance against accidents at work and occupational diseases, but also to obtain such cover from a specific insurance association. The obligation pursuant to the German legal system to be affiliated to a particular insurance association for the purposes of obtaining the insurance cover required by law appears a priori to have the effect of limiting an employer's choice of insurance provider, as it may not choose which insurance association in Germany to join nor may that employer obtain such cover solely from private insurance undertakings established in Germany or in other Member States. [39]

72. However, as I have outlined above in my answer to the first question referred, I consider, subject to certain verifications by the referring court, that the German insurance scheme in question is founded on the principle of solidarity and contains redistri-

35 — In my view the provision of insurance against accidents at work and occupational diseases as part of a social security scheme is not harmonised by Community law. See inter alia, Article 2(2) of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) (OJ 1992 L 228, p. 1) which provides that '[t]his Directive shall apply neither to the types of insurance or operations, nor to undertakings or institutions to which Directive 73/239/EEC does not apply, nor to the bodies referred to in Article 4 of that Directive'. Pursuant to Article 2(1) of First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (OJ 1973 L 228, p. 3) '[t]his Directive does not apply to: … (d) Insurance forming part of a statutory system of social security'. See also Article 3(4) of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ 2002 L 345, p. 1). While not relevant in the context of the proceedings before the referring court, see however Article 2(3) of Directive 2002/83.

36 — See Case C-158/96 *Kohll* [1998] ECR I-1931, paragraphs 17 and 18 and the case-law cited.

37 — See Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraphs 45 and 46, wherein it is made clear that the Member States when exercising their powers in order to determine 'the conditions concerning *the right or duty to be insured* with a social security scheme' 'must comply with Community law' (emphasis added).

38 — See, to that effect, *Kohll*, cited in footnote 36, paragraphs 20 and 21 and the case-law cited therein. See also Case C-355/00 *Freskot* [2003] ECR I-5263, paragraph 53.

39 — It must be stressed that there is no information before this Court which would indicate that the obligation to be affiliated to a particular insurance association was adopted for discriminatory purposes or indeed has any discriminatory effects over and above those inherent to the obligation itself. The obligation to be affiliated to a particular insurance association would, however, appear to ensure that insurance obtained from a private insurer can only be additional to that stipulated by law.

butive elements which exceed that of private insurance cover. I thus have grave doubts as to whether private insurance undertakings would offer insurance against accidents at work and occupational diseases in Germany which incorporate the elements of solidarity in question. [40] I therefore consider that, in principle, compulsory affiliation to an insurance association such as MMB does not in fact operate as a restriction on the freedom to provide services. [41]

73. In the event, however, that the Court should find that compulsory affiliation to an insurance association such as MMB constitutes a restriction on the freedom to provide services, the Court, before giving a ruling on whether Article 49 EC et seq. precludes such an obligation, must examine whether it can be objectively justified. In that regard, the Court has held on a number of occasions that it is possible for the risk of seriously undermining the financial balance of a social security system to constitute per se an overriding reason in the general interest capable of justifying an obstacle to the freedom to provide services. [42]

74. The referring court stated briefly in its order for reference that compulsory affiliation is not essential for the financial balance of the German scheme in question or for application of the principle of solidarity. It is however unclear, in my view, from the order for reference whether the referring court's statement refers to the lack of necessity of compulsory affiliation under the German scheme as it currently stands or whether the referring court considers that compulsory affiliation would not be necessary if the present scheme were altered.

75. In those circumstances, I consider that it is for the referring court to determine, on the basis of all the information available to it, whether the obligation to be affiliated to an insurance association such as MMB is necessary for the financial balance of the current German insurance scheme against accidents at work and occupational diseases or whether measures which are less restrictive could be adopted.

40 — The referring court indicated in the order for reference that insurance against accidents at work and occupational diseases is provided by private insurance providers in Belgium, Denmark, Finland and Portugal. However, such private schemes would appear, subject to verification by the referring court, to be operated on a profit-making basis and do not contain the elements of solidarity present in the German scheme. Moreover, while the order for reference indicates that Kattner has submitted a proposal by a Danish insurance provider, according to which that company too will insure Kattner in accordance with German accident insurance law against the risk of accidents at work, occupational diseases or accidents on the way to or from work, on the same terms as those of MMB and the benefits paid would be determined strictly in accordance with the list of benefits provided by the Deutsche Gesetzliche Unfallversicherung, there is no indication in the order for reference that the Danish provider will operate other than on a profit-making basis.

41 — See by analogy *Freskot*, cited in footnote 38, paragraphs 67 and 68.

42 — *Kohll*, cited in footnote 36, paragraph 41; *Smits and Peerbooms*, cited in footnote 37, paragraph 72; Case C-385/99 *Müller-Fauré* [2003] ECR I-4509, paragraph 73; and Case C-444/05 *Stamatelaki* [2007] ECR I-3185, paragraph 30.

76. In the light of all the foregoing considerations and subject to certain verifications by the referring court, I consider that Article 49 EC et seq. must be interpreted as not precluding the compulsory affiliation of an employer such as Kattner to a body such as MMB for the purposes of obtaining insurance against accidents at work and occupational diseases.

VI — Conclusion

77. Accordingly the questions referred in this case should in my opinion be answered as follows:

(1) The concept of an undertaking, within the meaning of Articles 81 EC and 82 EC, does not include bodies such as Maschinenbau- und Metall-Berufsgenossenschaft charged with the operation of a social security scheme based on the principle of solidarity, provided that all the essential elements of that scheme noted in this Opinion are subject to State supervision, which is a matter for the referring court to establish.

(2) Articles 49 EC et seq., 82 EC and 86 EC must be interpreted as not precluding the compulsory affiliation of an employer such as Kattner Stahlbau GmbH to a body such as Maschinenbau- und Metall-Berufsgenossenschaft for the purposes of obtaining insurance against accidents at work and occupational diseases.